

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: CACE18-016496

KM1 and KM2, minor children and
their adoptive parents and guardians,
TM and MM,

Plaintiffs,

v.

CHILDNET, INC., NATIONAL
YOUTH ADVOCATE PROGRAMS,
INC. and KIDS IN DISTRESS, INC.

Defendants.

/

**PLAINTIFFS' RESPONSE TO DEFENDANT, KIDS IN DISTRESS, INC.'S
OBJECTION TO FIRST REQUEST FOR PRODUCTION**

Plaintiffs, by and through undersigned counsel, pursuant to Rules 1.280 of the Florida Rules of Civil Procedure, hereby file this Response to Defendant, Kids in Distress, Inc.'s (*hereinafter KIDS*), Objection to First Request for Production, and in support thereof state as follows:

1. On or about April 11, 2019, Plaintiffs served their First Request for Production on KIDS specifically requesting

A full and complete copy of the personnel file(s), including, but not limited to: applications for employment; any documents used to determine qualifications for hiring and/or promotion; criminal history and background information searches; verification of references; job descriptions; signed receipts or acknowledgements reflecting receipt of any employee handbooks, training materials, internal operating procedures, performance standards, or similar documents; disciplinary actions, including termination; notices of commendation, warning, discipline, and/or termination; education,

training, and certification notices and records, including records of attendance and proof of completion; performance appraisals/reviews/evaluations; complaints from clients, co-workers, or supervisors; documents regarding promotion and/or demotion; any contract, written agreement, receipt, or acknowledgment between the employee and the employer (such as an employment contract, performance action plans, non-compete agreements, or confidentiality agreements); documents relating to the employee's discontinuation of employment, including reasons why the worker left or was fire, for the following employees, contractors, and/or agents from their date of hire to the present:

- a. Alaina McCoy;
- b. Marlo Gentner;
- c. Lori Rosenthal; and
- d. Jennifer Balandrano.

To the extent that these records contain social security numbers, bank account numbers, or medical information, it is requested that such information be appropriately redacted, but that the documents be otherwise produced in their entirety.

See Exhibit "A."

2. On or about May 17, 2019, KIDS Responded to the Plaintiffs' First Request for Production and in response stated:

Objection, overbroad in time and scope, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and private. *See, e.g., Walker v. Rout*, 111 So. 3d 294 (Fla. 5th DCA 2013) (personnel files undoubtedly contain private information); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641 (10th Cir. 2008). Additionally, upon information and belief, Lori Rosenthal is an employee of NYAP. As such, KIDS does not have a copy of her file in its possession, custody or control.

See Exhibit "B."

3. These objections are without merit. Alaina McCoy, Marlo Gentner, and Jennifer Bandalrano provided foster care and adoption related to services to the plaintiffs. Marlo Gentner provided therapeutic services to KM1 while in the Williams foster home. Jennifer Bandalrano provided adoption related services to KM1, KM2, TM, and MM. Alaina McCoy was the Clinical Supervisor who supervised both Marlo Gentner and Jennifer Bandalrano. As such, Ms. McCoy

was familiar with KM1 from the time he entered the Williams foster home through the time of the adoption. These three KIDS employees have first-hand knowledge of KM1's ongoing behaviors, the need for a safety plan, the concerns noted while KM1 was in foster care, and the acts that happened up until the time of the child-on-child sexual incident. How these employees and/or contractors performed in their jobs is relevant to this case and is reasonably calculated to lead to the discovery of admissible evidence. Further, Plaintiffs' request is limited to the time these employees began working for KIDS through the present.

4. With respect to KIDS objection that the request seeks private information of these employees, this objection is similarly without merit. Plaintiffs understand that there may be some confidential information contained in the requested files such as social security numbers, home addresses, financial information, medical information, and possibly some identifying information of other clients of KIDS. Plaintiffs' counsel has previously advised KIDS' counsel that they have no objection to this type of confidential information being redacted pursuant to the Rules of Civil Procedure and Chapter 39. However, an objection that the entire personnel file of these individuals is somehow privileged is unsupported by law. *See, for eg., Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936 (Fla. 2002) (holding that privacy rights may only extend to personal information contained in nonpublic employee personnel files).

5. As a private entity that has undertaken to provide a service otherwise provided by the government, KIDS is bound by the Public Records Act. *See Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001); *Memorial Hospital-West Volusia, Putnam County Humane Soc., Inc. v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999). The 2019 Government in the Sunshine Manual (hereinafter "2019 Manual") specifically addresses personnel records and states as follows: "The general rule with regard to personnel records is the same as for

other public records; unless the Legislature has expressly exempted certain personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under s. 119.07(1), FS.” 2019 Manual, p. 126-127. Furthermore, “The courts have rejected claims that constitutional privacy interests operate to shield agency personnel records from disclosure. . . . ‘Absent an applicable statutory exemption pursuant to Florida’s Public Records Act (embodied in chapter 119, Florida Statutes), public employees (as a general rule) do not have privacy rights in such records.’” 2019 Manual, p.131 (citing to *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 940 n.4 (Fla. 2002)). For example, in *Michel v. Douglas*, the Florida Supreme Court ruled that personnel records kept at a tax-supported hospital were public records within the meaning of chapter 119 and ordered that access be given to the requested personnel records. 464 So. 2d 545, 546-47 (Fla. 1985). The Court further noted that “[w]hat is kept in personnel files is largely a matter of judgment of the employer, but whatever is so kept is public record and subject to being published.” *Id.* at 547. “Evaluations of public employee performance are generally subject to disclosure.” 2019 Manual, p 133; *see also News-Press Publishing Co. v. Wisher*, 345 So. 2d 646, 648 (Fla. 1977) (“No policy of the state protects a public employee from the embarrassment which results from his or her public employer’s discussion or action on the employee’s failure to perform his or her duties properly.”) Pursuant to section 119.07(d), “A person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying.” *Fla. Stat.* § 119.07(d)(2018). Furthermore, “If requested by the person seeking to inspect or copy the record, the custodian of public records shall state in writing and with particularity the reasons for the conclusion that the record is exempt or

confidential.” *Fla. Stat.* § 119.07(f)(2018). Based on the foregoing, Plaintiffs are entitled to the personnel files of those current and/or former KIDS employees who were involved in his case.

6. Plaintiffs’ counsel certifies that they have conferred with KIDS’ counsel and have made a good faith effort to resolve this discovery dispute prior to filing this motion but have been unable to do so. *See Exhibit “C.”*

7. Pursuant to Rule 1.380(a)(4), Plaintiffs are entitled to “the reasonable expenses,” including attorney’s fees, incurred as a result of bringing this motion if Plaintiffs’ motion is granted. The violation of a court order is not required to receive fees.

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court enter an Order compelling KIDS to provide better responses to Plaintiffs’ First Request for Production and for whatever further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 21st day of May 2019, a true and correct copy of the above and foregoing was served via the E-Portal on:

MARLOW ADLER ABRAMS NEWMAN & LEWIS 4000 Ponce de Leon Blvd., Suite 570 Coral Gables, FL 33146 Telephone: (305) 446-0500 Facsimile: (305) 446-3667 MARITZA PENA, Esquire Florida Bar No.: 145637 RENEE GOMEZ, Esquire Florida Bar No.: 35544 mpena@marlowadler.com <i>Counsel for ChildNet, Inc.</i>	WICKER SMITH O'HARA MCCOY & FORD, P.A. 515 E. Las Olas Boulevard Fort Lauderdale, FL 33301 Telephone: (954) 847-4800 Facsimile: (954) 760-9353 JASON A. GLUSMAN, Esquire Florida Bar No.: 0419400 CARLOS A. GARCIA, Esquire Florida Bar No.: 99768 ftlcrtpleadings@wickersmith.com <i>Counsel for National Youth Advocate Program, Inc.</i>
COLE, SCOTT & KISSANE, P.A. 9150 South Dadeland Blvd., Suite 1400 P.O. Box 569015 Miami, FL 33256	

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INC. and KIDS IN DISTRESS, INC.

Defendants.

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PLAINTIFFS' FIRST REQUEST FOR PRODUCTION TO
DEFENDANT, KIDS IN DISTRESS, INC

Plaintiffs, KM1 and KM2, minor children, and their adoptive parents and guardians, TM and MM, by and through their undersigned counsel, and pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, hereby request Defendant, KIDS IN DISTRESS, INC. ("KIDS"), to produce the original or best copy of the items listed hereinbelow, at the offices of the Plaintiff's undersigned counsel, for inspection and/or copying, pursuant to the applicable Florida Rules of Civil Procedure.

DEFINITIONS

The term "document" or "documents" shall mean all written or graphic matter of every kind or description, however, produced or reproduced, whether draft or final, original or reproduction signed or unsigned, and regardless of whether approved, signed, sent, received, redrafted, or executed, including but not limited to: written communications, letters, correspondence, facsimiles, e-mail, text messages, instant messages, memoranda, minutes, notes, films, recordings, of any type, transcripts, contracts, agreements, charts, graphs, indices, data sheets, data processing cards or tapes, work papers, purchase or sales orders, memoranda of telephone conversations of personal conversations, diaries, desk calendars, interoffice



communications, reports, studies, bills, receipts, checks, checkbooks, invoices, requisitions or material similar to any of the foregoing however denominated, by whomever prepared, and to whomever addressed, which are in your possession, custody or control or to which you have had or can obtain access. If you do not have custody or control of the original, the term "document" or "documents" shall also include any carbon or photograph or any other copies, telephone messages, reproductions or facsimiles thereof. If you have custody or control of the original and copies, reproduction or facsimiles, the term "document" or "documents" shall mean the original of any copy or reproduction or facsimile that is in any way different from the original.

The term "communication" or "communications" shall mean all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, correspondence, notes, telegrams, telexes, advertisements, facsimiles, e-mail, text messages, instant messages, or other forms of verbal and/or communicative intercourse.

DOCUMENTS REQUESTED

1. A full and complete copy of the personnel file(s), including, but not limited to: applications for employment; any documents used to determine qualifications for hiring and/or promotion; criminal history and background information searches; verification of references; job descriptions; signed receipts or acknowledgements reflecting receipt of any employee handbooks, training materials, internal operating procedures, performance standards, or similar documents; disciplinary actions, including termination; notices of commendation, warning, discipline, and/or termination; education, training, and certification notices and records, including records of attendance and proof of completion; performance appraisals/reviews/evaluations; complaints from clients, co-workers, or supervisors; documents regarding promotion and/or demotion; any contract, written agreement, receipt, or acknowledgment between the employee and the employer (such as an employment contract, performance action plans, non-compete agreements, or confidentiality agreements); documents relating to the employee's discontinuation of employment, including reasons why the worker left or was fired, for the following employees, contractors, and/or agents from their date of hire to the present:

- a. Alaina McCoy;
- b. Marlo Gentner;
- c. Lori Rosenthal; and
- d. Jennifer Balandrano.

To the extent that these records contain social security numbers, bank account numbers, or medical information, it is requested that such information be appropriately redacted, but that the documents be otherwise produced in their entirety.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 11th day of April 2019, a true and correct copy of the above and foregoing was served via the E-Portal on:

<p>MARLOW ADLER ABRAMS NEWMAN & LEWIS 4000 Ponce de Leon Blvd., Suite 570 Coral Gables, FL 33146 Telephone: (305) 446-0500 Facsimile: (305) 446-3667 MARITZA PENA, Esquire Florida Bar No.: 145637 RENEE GOMEZ, Esquire Florida Bar No.: 35544 mpena@marlowadler.com <i>Counsel for ChildNet, Inc.</i></p>	<p>WICKER SMITH O'HARA MCCOY & FORD, P.A. 515 E. Las Olas Boulevard Fort Lauderdale, FL 33301 Telephone: (954) 847-4800 Facsimile: (954) 760-9353 JASON A. GLUSMAN, Esquire Florida Bar No.: 0419400 CARLOS A. GARCIA, Esquire Florida Bar No.: 99768 ftlcrtpleadings@wickersmith.com <i>Counsel for National Youth Advocate Program, Inc.</i></p>
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KM1 and KM2, minor children and their
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CASE NO.: CACE 18-016496

Plaintiffs,

v.

CHILDNET, INC. and NATIONAL YOUTH
ADVOCATE PROGRAMS, INC. and KIDS
IN DISTRESS, INC.,

Defendants.

DEFENDANT'S RESPONSES TO PLAINTIFFS'
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW, Defendant, KIDS IN DISTRESS, INC., pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, hereby responds to Plaintiffs' KM1 and KM2, minor children and their adoptive parents and guardians, TM and MM's First Request for Production of Documents as follows:

RESPONSES TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION

1. A full and complete copy of the personnel file(s), including, but not limited to: applications for employment; any documents used to determine qualifications for hiring and/or promotion; criminal history and background information searches; verification of references; job descriptions; signed receipts or acknowledgements reflecting receipt of any employee handbooks, training materials, internal operating procedures, performance standards, or similar documents; disciplinary actions, including termination; notices of commendation, warning, discipline, and/or termination; education, training, and certification notices and records, including records of attendance and proof of completion; performance appraisals/reviews/evaluation;

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complaints from clients, co-workers, or supervisors; documents regarding promotion and/or demotion; any contract, written agreement, receipt, or acknowledgment between the employee and the employer (such as an employment contract, performance action plans, non-compete agreements, or confidentiality agreements); documents relating to the employee's discontinuation of employment, including reasons why the worker left or was fired, for the following employees, contractors, and/or agents from their date of hire to the present:

- a. Alaina McCoy;
- b. Marlo Gentner;
- c. Lori Rosenthal; and
- d. Jennifer Balandrano.

To the extent that these records contain social security numbers, bank account numbers, or medical information, it is requested that such information be appropriately redacted, but that the documents be otherwise produced in their entirety.

ANSWER: Objection, overbroad in time and scope, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and private. See, e.g., *Walker v. Rout*, 111 So. 3d 294 (Fla. 5th DCA 2013) (personnel files undoubtedly contain private information); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641 (10th Cir. 2008). Additionally, upon information and belief, Lori Rosenthal is an employee of NYAP. As such, KIDS does not have a copy of her file in its possession, custody or control.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2019, a true and correct copy of the foregoing was filed with the Clerk of Broward County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system: Jason A. Glusman, Esq., Wicker Smith O'Hara McCoy & Ford, P.A., ftlcrtpleadings@wickersmith.com, 515 E Las Olas Blvd Ste 1400, Fort Lauderdale, FL 33301, (954) 847-4800, Attorney for Defendant, National Youth Advocate Programs, Inc., Renee Gomez, Esq., Marlow, Adler, Abrams, Newman & Lewis, rgomez@marlowadler.com; bzamora@marlowadler.com; nvaldesrecio@marlowadler.com, 4000 Ponce de Leon Blvd., Suite 570, Coral Gables, FL 33146, (305) 446-0500/(305) 446-3667 (F), Attorney for Defendant, Childnet, Inc.,

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May 20, 2019

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Re: CACE-18-016496 – KM1 and KM2, et al v. NYAP, et al.

Dear Ms. Allegra and Ms. Correa:

This is a good faith effort to resolve discovery matters pertaining to Plaintiffs' First Request for Production of Documents, Contention Interrogatories, and Insurance Interrogatories for this case.

On April 11, 2019, Plaintiffs' served your client with the First Request for Production of Documents, *see Exhibit "A"*, specifically requesting personnel files for Kids In Distress Employees, including the personnel files for those whose depositions are being scheduled.

On May 17, 2019, KIDS objected to producing the personnel files for Alaina McCoy, Marlo Gentner, and Jennifer Balandrano on the basis that the request is allegedly overbroad, irrelevant, not reasonably calculated to the discovery of admissible evidence, and private. These three employees were heavily involved in the services provided to KM1 while in foster care and to all of the Plaintiffs while providing them with adoption related services. On the issue of privacy, the RFP specifically states that "*to the extent that these records contain social security numbers, bank account numbers, or medical information, it is requested that such information be appropriately redacted, but that the documents be otherwise produced in their entirety.*" See *Exhibit "B"*.

EXHIBIT
C

At the May 10, 2019 Case Management Conference, dates were set aside to take depositions for the aforementioned Kids in Distress employees. Specifically, Marlo Gentner's deposition is scheduled for June 6, 2019; Jennifer Balandrano's deposition is scheduled for July 15, 2019; and Alaina McCoy's deposition is scheduled for July 17, 2019, *see Composite Exhibit "C"*. During the scheduling of these depositions, we were advised that it was critical to take Marlo Gentner's deposition on June 6, 2019 as she was leaving Kids in Distress.

In an effort to avoid an unnecessary hearing, we request that you *timely provide these personnel files as the deposition on June 6th must move forward and the personnel records are critical in preparing for the deposition.* As indicated in the RFP, please redact all private information and/or provide a Privilege log for those documents deemed to be privileged.

Lastly, *KIDS' Answers to Plaintiffs' Insurance Interrogatories and KIDS' Answers to Plaintiffs' Contention Interrogatories were not verified*, *see Composite Exhibit "D"*. Please resubmit Verified Answers to both Interrogatories. I await your expedited response. Please note that if this information is not received by close of business Wednesday, May 22, 2019, we will have no choice but to seek court intervention.

Very truly yours,



Maha A. ELKolalli

MAE/bmr
Enclosure